JOSEPH E. SHORIN III
ANDREW A. FITZ
Assistant Attorneys General
PO Box 40117
Olympia, WA 98504-0117
Phone: (360) 586-6770

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	**NO. CT-03-5018-AAM** **STATE OF WASHINGTON'S FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**
COLUMBIA RIVERKEEPER, et al., Plaintiffs, v. SPENCER ABRAHAM, Secretary of Energy, et al., Defendants.	NO. CT-03-5044-AAM *consolidated*

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

I. INTRODUCTION

1. This is an action for declaratory and injunctive relief arising from the United States Department of Energy's (DOE) decisions to ship radioactive and radioactive/hazardous (mixed) waste across the nation to the Hanford Nuclear Reservation in Eastern Washington. DOE has decided to ship approximately 51 cubic meters of transuranic waste (TRU)[1] and transuranic mixed (TRUM) waste to Hanford for treatment and/or indefinite storage pending potential ultimate disposal in New Mexico. DOE has also decided to make Hanford a regional

---

[1] Transuranic waste that is mixed with hazardous constituents is transuranic mixed waste, or TRUM. Where necessary to distinguish between transuranic wastes that are mixed and those that are not, this First Amended Complaint refers to TRU and TRUM. Use of the term "transuranic waste" will refer to the entire category of such waste, regardless of whether they are mixed.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

disposal site for DOE low-level radioactive waste (LLW)[2] and mixed low-level radioactive waste (MLLW), and to dispose up to 62,000 cubic meters of LLW and up to 20,000 cubic meters of MLLW at the Hanford Site. DOE made its decisions to ship these wastes to Hanford without complying with the requirements of the National Environmental Policy Act (NEPA). DOE's decision is arbitrary and capricious, not in accordance with the law, and without observance of procedures required by law, in that it violated NEPA and applicable implementing regulations and relies on outdated, inadequate, and/or incorrect information concerning the volume and sources of wastes needing disposition, and concerning the potential impacts from transportation of these wastes to, and storage, treatment, and/or disposal of these wastes, at the Hanford Site.

DOE is already storing more than 75,000 drums or drum equivalents of suspected TRUM waste at Hanford in violation of the Washington Hazardous Waste Management Act (HWMA), Wash. Rev. Code 70.105. Storage at Hanford

---

[2] Low-level radioactive waste that is mixed with hazardous constituents is mixed low-level radioactive waste, or MLLW. Where necessary to distinguish between low-level radioactive wastes that are mixed and those that are not, this First Amended Complaint refers to LLW and MLLW. Use of the term "low-level radioactive waste" will refer to the entire category of such waste, regardless of whether they are mixed.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

of the additional transuranic wastes at issue in this lawsuit will likewise violate the HWMA.

2. The State of Washington requests a judgment declaring that DOE's decisions to treat and/or store transuranic wastes at Hanford violate NEPA and applicable implementing regulations, are arbitrary and capricious, are not in accordance with the law, and are without observance of procedures required by law; and declaring that DOE's continued storage of certain untreated TRUM waste at the Hanford Site, and storage of additional off-site TRUM waste at Hanford, violates the HWMA and applicable regulations. Further, the State seeks preliminary and permanent injunctive relief requiring DOE to rescind its decisions to ship transuranic wastes to Hanford, and prohibiting DOE from shipping any additional such wastes to Hanford until DOE (1) has fully complied with NEPA; (2) has undertaken a decision-making process based on current facts and circumstances, in full compliance with the Administrative Procedure Act (APA); and (3) has complied with the HWMA prohibition on continued storage of certain untreated mixed waste.

3. The State likewise requests a judgment declaring that DOE's decisions to transport to and dispose of at Hanford LLW and MLLW from other DOE sites violate NEPA and applicable implementing regulations, are arbitrary and capricious, are not in accordance with the law, and are without observance of procedures required by law. Further, the State seeks preliminary and permanent injunctive relief requiring DOE to rescind its decisions to ship to and dispose of

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

off-site LLW and MLLW from other DOE sites at the Hanford Site, and prohibiting DOE from transporting any additional such wastes to Hanford until DOE (1) has fully complied with NEPA; and (2) has undertaken a decision-making process based on current facts and circumstances, in full compliance with the APA.

II. JURISDICTION AND VENUE

4. This action arises under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, adopted by the Council on Environmental Quality (CEQ) and applicable to all agencies (CEQ NEPA Regulations), 40 C.F.R. Parts 1500-1508, and the DOE's implementing procedures, 10 C.F.R. Part 1021. Plaintiff seeks judicial review pursuant to the APA, 5 U.S.C. §§ 701-706, authorizing judicial review of all agency actions. This Court also has jurisdiction over this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Finally, jurisdiction over Plaintiff's claim to enforce the HWMA arises pursuant to Wash. Rev. Code § 70.105.120. The Court has supplemental jurisdiction over the HWMA claim pursuant to 28 U.S.C. § 1367.

5. The United States has waived sovereign immunity with respect to the claims asserted herein under 5 U.S.C. § 702 (APA) and 42 U.S.C. § 6961 (Resource Conservation and Recovery Act (RCRA)).

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

III. PARTIES

7. Plaintiff is the State of Washington. The State owns the groundwater and surface water of the state, including the groundwater beneath the Hanford Site, the Columbia River, and all ground and surface water within the state over or through which DOE must transport the transuranic and low-level radioactive wastes at issue. The State also owns numerous roads and highways over which DOE will transport its waste to Hanford. State Road 240 runs through the Hanford Site. Other state roads and highways in the vicinity include State Roads 14, 24, and 224. The State's waters, highways, and roads are threatened by the transport of radioactive and hazardous wastes to Hanford, and by Defendants' treatment, storage, and/or disposal of those wastes at Hanford, in violation of NEPA, the APA, and the HWMA.

8. Additionally, the State has a direct and tangible interest in the health, safety, and welfare of its citizens, and of the lands, air, and water of the state, which are threatened by Defendants' actions. Finally, the State, through its Department of Ecology, is responsible for implementing the HWMA, Wash. Rev. Code § 70.105, at facilities that treat, store, or dispose of hazardous or dangerous wastes, including the Hanford Site.

9. Defendants' plans to transport transuranic and low-level radioactive wastes to Hanford, to treat and/or indefinitely store transuranic wastes at Hanford without complying with the HWMA, and to dispose of low-level radioactive wastes at Hanford, pose significant risks to human health and the environment.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

These risks include potential pollution to groundwater and surface water of the state, such as the Columbia River, and to adjoining state-owned lands, which are used by the state and its people for commerce, fishing, recreation, habitat, aesthetics, tourism, and maintaining the cultural identity of the state. Additionally, the treatment and/or indefinite storage of off-site radioactive and hazardous transuranic waste at Hanford, and the disposal at Hanford of off-site low-level radioactive waste, will only complicate Defendants' already troubled effort to cleanup existing radioactive and hazardous wastes, including transuranic wastes and low-level radioactive wastes, currently located at Hanford, and will frustrate the State's regulatory efforts to require DOE to bring its activities and facilities at the Hanford Site into compliance with applicable law.

10. Defendant Spencer Abraham is the Secretary of the United States Department of Energy, and is the chief administrative officer of DOE. Secretary Abraham is the official ultimately responsible for the waste management decisions of DOE, including DOE decision-making with respect to storage, treatment, and disposal of DOE's transuranic and low-level radioactive wastes.

11. Defendant United States Department of Energy is an executive department of the United States, created pursuant to 42 U.S.C. § 7131. DOE owns and/or operates the Hanford Site near Richland, Washington. Hanford is one of the most contaminated places on the planet. DOE has decided, pursuant to a flawed NEPA process, to utilize the Hanford Site for treatment and/or storage of

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

transuranic waste and for disposal of low-level radioactive waste currently located at other DOE sites.

IV. FACTS

12. As a consequence of over fifty years of nuclear weapons research, production, and reprocessing, DOE and its predecessors generated large quantities of radioactive and mixed (hazardous and radioactive) waste at sites across DOE's national nuclear weapons complex.

13. DOE is responsible for the treatment, storage, and disposal of vast inventories of radioactive and mixed waste that have resulted from its past nuclear energy and weapons research, production, and reprocessing, and from decontamination and decommissioning of former nuclear weapons sites.

14. At its peak, the federal nuclear weapons complex consisted of sixteen major facilities, including large sites in Colorado, Idaho, Nevada, New Mexico, South Carolina, Tennessee, and Washington. The most contaminated of these sites is the Hanford Site in Washington State.

15. Between 1943 and 1987, the United States produced plutonium at the Hanford Site for use in nuclear weapons. Plutonium production and other activities at Hanford created enormous amounts of radioactive, hazardous, and mixed wastes, some of which were disposed of directly into the ground, some of which were stored in various forms at Hanford, and much of which remains at the Site today, still awaiting cleanup and/or disposal.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

16. Today, the Hanford Site contains over 1,500 identified contaminated sites and structures, which individually and collectively pose substantial risks to human health and the environment. For example, there are: (1) 53 million gallons of high-level radioactive waste stored in 28 double-shell tanks and 149 single-shell tanks, at least 67 of which have together already leaked one million or more gallons of waste to the surrounding soil and to groundwater that flows toward the Columbia River; (2) tons of spent fuel and sludge stored underwater in deteriorating K-Basins located a mere 400 yards from the Columbia River, and 30 metric tons of non-defense spent nuclear fuel stored underwater in other storage basins; (3) approximately 3,700 kilograms of plutonium stored in aging facilities; (4) approximately 640,000 cubic meters of LLW already disposed of at Hanford in shallow, unlined trenches, or planned by DOE for disposal at Hanford; (5) approximately 920,000 cubic meters of MLLW already disposed of at Hanford (or planned by DOE for disposal at Hanford) in land disposal trenches; and (6) long-term release hazards through Hanford's vadose zone and groundwater. One cubic meter is roughly equivalent to the volume contained by five 55-gallon drums.

17. Among the wastes generated during plutonium production at Hanford were large quantities of transuranic wastes. Transuranic wastes are wastes that have been contaminated with radioactive elements that have an atomic number higher than that of uranium. By definition, transuranic wastes contain more than 100 nanocuries of alpha-emitting transuranic isotopes per gram of waste, and have

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

half-lives of greater than 20 years. Transuranic wastes contain radioactive elements such as plutonium. Some transuranic wastes also contain hazardous constituents (mixed transuranic wastes), and are regulated under RCRA, 42 U.S.C. §§ 6901 *et seq*.

Also produced in large quantities at Hanford were LLW and MLLW. LLW is defined as radioactive waste that is not high-level radioactive waste, spent nuclear fuel, by-product material (as defined in the Atomic Energy Act), or naturally occurring radioactive material. MLLW is defined as low-level radioactive waste that contains a hazardous component regulated under federal or state hazardous waste laws.

18. Radioactive waste is classified according to the radiation dose at a package surface. "Contact-handled" waste has a radiation dose at package surface of 200 millirems per hour or less. This packaged waste can be handled directly by personnel. "Remote-handled" waste has a radiation dose at package surface of greater than 200 millirems per hour, and must be handled with special machinery designed to shield workers from radiation.

19. Between 1970 and 1985, DOE "retrievably stored" at Hanford approximately 16,000 cubic meters (equivalent to 80,000 fifty-five gallon drums) of known or suspected transuranic waste in drums and other containers. This waste remains on the Hanford Site today. Almost none of this waste has been "designated" (*i.e.*, characterized as required by state and federal regulations), and

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

nearly all of it is partially buried in unlined trenches at the Hanford Low-Level Burial Grounds (LLBG).

20. Washington State attempted to work with DOE to establish an agreed compliance schedule for the retrieval, designation, treatment, and ultimate transport of this material for disposal at the Waste Isolation Pilot Plant (WIPP)—a repository near Carlsbad, New Mexico constructed specifically for the deep geologic disposal of transuranic waste. As of March 4, 2003, when the State filed this lawsuit, DOE had not made enforceable commitments for this work, and had made little progress in dealing with the known and suspect TRU and TRUM waste already at the Hanford Site.

21. Washington State regulates DOE's management of hazardous wastes and radioactive/hazardous "mixed" wastes at Hanford pursuant to the HWMA. The State is authorized by the United States Environmental Protection Agency (EPA) to operate the State's hazardous waste program in lieu of federal RCRA requirements.

22. DOE's "retrievably stored" waste has not been designated pursuant to Wash. Admin. Code 173-303-070 (*i.e.*, characterized) to determine what, if any, hazardous constituents may be present in the waste and how those constituents will affect the safe storage, management, and disposal of the waste, and any treatment required (*e.g.*, whether the wastes are corrosive, ignitable, reactive, and/or toxic).

23. The long-term buried storage of "retrievably stored" waste violates Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

§ 265.173(b), which require that a container holding hazardous waste not be stored in a manner which may rupture the container or cause it to fail.

24. Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R. § 265.171 require that if a container holding hazardous waste is not in good condition, the owner or operator must transfer the contents to another container or manage the container in some other way that complies with the regulations. Numerous containers in retrievable storage have significantly deteriorated and are not managed in accordance with these regulations.

25. The retrievably stored waste is stored in a manner that precludes weekly inspection for leaks and for deterioration caused by corrosion or other factors, as required by Wash. Admin. Code 173-303-400(3)(a) and by incorporation 40 C.F.R. § 265.174.

26. Wash. Admin. Code 173-303-400 and by reference 173-030-630(3) requires the owner/operator to ensure that the waste container's labels are not obscured, removed, or otherwise unreadable during inspections.

27. The retrievably stored waste is stored in a manner that obscures the waste container labels, renders them unreadable, and precludes determinations concerning whether the labels have been removed.

28. DOE has not even determined which containers of the retrievably stored waste are transuranic.

29. Facilities in the state that treat, store, and/or dispose of hazardous waste must be permitted by the Washington State Department of Ecology

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

(Ecology). Facilities that were in existence at the time that they became subject to HWMA and RCRA requirements may operate under limited "interim status standards" pending Ecology's issuance of a final facility permit, if the facilities timely submit to Ecology a "Part A permit application" and comply with the interim status standards set forth in the regulations. Wash. Admin. Code § 173-303-805.

30. Ecology has issued to DOE a single final facility permit for the entire Hanford Site, pursuant to Wash. Admin. Code § 173-303-806. However, due to the number and complexity of treatment, storage, and disposal (TSD) units at Hanford, final facility standards have not been established for all TSD units at the Site. DOE is subject to a compliance schedule for submitting final status permit (Part B) applications for numerous TSD units. Once approved by Ecology, those standards will be incorporated, on a unit-by-unit basis, into the Hanford Site final status permit.

31. DOE has informally advised Ecology that DOE may treat and/or store off-site TRU and TRUM waste at one or more of the following TSDs at Hanford: the LLBG, T-Plant, the Central Waste Complex, and the Waste Receiving and Processing Facility. Because final facility standards have not been approved for any of these units, they are all operated subject to interim status facility standards.

32. In 1989, Ecology, EPA, and DOE entered into the "Hanford Federal Facility Agreement and Consent Order" (HFFACO). The HFFACO is both a federal facility agreement pursuant to the Comprehensive Environmental

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, and a consent order pursuant to RCRA, 42 U.S.C. §§ 6901-6922k, and Washington's HWMA. The HFFACO establishes numerous milestones (schedules and associated regulatory requirements) for cleanup of the Hanford Site, and for bringing Hanford facilities into compliance with applicable requirements.

33. Since establishment of the HFFACO, Ecology and EPA have issued to DOE over seventy (70) written notices of violation of federal and state hazardous and mixed waste laws. EPA has designated DOE and the Hanford Site as a "Significant Non-Complier" due to its exceptionally poor performance and repeated violations of hazardous waste management requirements.

34. DOE's Office of Environmental Management is responsible for a variety of waste management and environmental restoration activities, including but not limited to managing a large amount and variety of radioactive and hazardous wastes; providing safe storage for wastes while building and operating a variety of treatment facilities to prepare wastes for disposal; and cleaning up areas of existing contamination and pollution.

35. In May 1997, DOE, through its Office of Environmental Management, issued its Final Waste Management Programmatic Environmental Impact Statement for Managing Treatment, Storage, and Disposal of Radioactive and Hazardous Waste (WM PEIS). The purpose of the WM PEIS was to help

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

DOE identify and select the optimal national configuration for the management (treatment, storage, or disposal) of five types of waste:

- Treatment and disposal of MLLW
- Treatment and disposal of LLW
- Treatment and storage of transuranic waste
- Storage of treated (vitrified) high-level waste canisters until a geologic repository is available
- Treatment of nonwastewater hazardous waste

36. With respect to transuranic waste, the WM PEIS evaluated alternatives for storage and treatment of transuranic waste located at sites across the DOE national nuclear weapons complex. The WM PEIS evaluated alternatives for storage and treatment on a centralized, regionalized, and decentralized basis.

37. The WM PEIS identified DOE's preferred alternative for treatment and storage of transuranic waste as having nine major DOE sites (including Hanford) treat and store their own waste onsite (decentralized basis), and for three sites (the Idaho National Engineering Laboratory (INEL), Oak Ridge Reservation (ORR) in Tennessee, and Savannah River Site (SRS) in South Carolina) to serve as regional treatment and storage facilities.

38. With respect to LLW and MLLW, the WM PEIS likewise evaluated alternatives for waste treatment and disposal on a centralized, regionalized, and decentralized basis.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

39. The WM PEIS identified DOE's preferred alternative for disposal of MLLW as sending the waste to regional disposal sites after it is treated. DOE indicated it would select two to three sites from a list of six, which included Hanford, INEL, Los Alamos National Laboratory (LANL), Nevada Test Site (NTS), ORR, and SRS.

40. The WM PEIS identified DOE's preferred alternative for disposal of LLW as sending the waste to regional disposal sites after it is treated. DOE indicated it would select two to three sites from the same list of six sites DOE identified as candidates for MLLW regional disposal facilities.

41. However, for both LLW and MLLW, the WM PEIS did not identify a preferred alternative with respect to specific disposal sites. Instead, the WM PEIS examined a range of broadly defined waste management alternatives.

42. While the WM PEIS indicated it would be the basis for Records of Decision (ROD) on sites at which waste management activities would occur, the WM PEIS indicated that decisions regarding the specific technologies to be employed, and actual locations of waste management facilities at particular DOE sites, would not be made on the basis of the WM PEIS, but rather on sitewide or project-specific NEPA reviews.

43. The WM PEIS also did not include a quantitative analysis of cumulative impacts to the environment at Hanford or other sites of adding the waste covered by the WM PEIS to the environmental restoration waste (cleanup

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

and facility decommissioning derived waste) already at or to be generated in the future at the sites.

44. "Environmental restoration" includes activities undertaken pursuant to CERCLA and RCRA and can include removal and treatment of hazardous substances, containment of a source of contamination, or placement of land use restrictions on a contaminated site. It encompasses a wide range of activities such as stabilizing contaminated soil, treating groundwater, decommissioning process buildings, including nuclear reactors and chemical separation plants, and exhuming buried drums of waste. The WM PEIS indicated that environmental restoration impacts were reviewed but not analyzed in the WM PEIS.

45. On January 23, 1998, DOE published a Record of Decision on the Treatment and Storage of Transuranic Waste (1998 ROD). The 1998 ROD conveyed DOE's decision that each of the DOE sites that had or would generate transuranic waste would prepare and store its own transuranic waste on-site. The 1998 ROD noted that DOE may, in the future, decide to ship some transuranic wastes from sites where it may be "impractical" to prepare them for disposal to sites where DOE has or will have the necessary capability. The 1998 ROD listed Hanford as among the sites that could receive transuranic waste from other sites. However, the 1998 ROD indicated that "any future decisions regarding transfers of [transuranic] wastes would be subject to appropriate review under the National Environmental Policy Act."

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

46. DOE did not undertake the additional NEPA review contemplated by the WM PEIS before deciding to transfer transuranic, LLW, and MLLW wastes to Hanford from other DOE sites.

47. In September 1998, sixteen months following DOE's publication of the WM PEIS, DOE published a document entitled "Information Package on Pending Low-Level Waste and Mixed Low-Level Waste Disposal Decisions to be Made Under the Final Waste Management Programmatic Environmental Impact Statement" (Information Package). The Information Package was not made available for public comment prior to finalization.

48. The Information Package indicated that following issuance of the WM PEIS, DOE updated its estimates of the volume of LLW and MLLW requiring disposal over the twenty-year analysis period. The new estimates were derived from estimates presented in a 1998 DOE publication, entitled "Accelerating Cleanup: Paths to Closure." That document detailed DOE's then-current estimate of the scope, schedule, and costs for each site to complete the cleanup program. The waste volumes it contained reflected DOE's new efforts to accelerate the cleanup and closure of several DOE sites from which DOE had since decided it would send wastes to a regional disposal facility. DOE used the new estimates to develop the options evaluated in the Information Package.

49. In light of the changed data DOE intended to rely on in making its LLW and MLLW decisions, the Information Package contained the following statement:

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

> In addition to the analyses presented in this document, DOE is also preparing a Supplement Analysis to the WM PEIS. DOE's NEPA regulations require a Supplement Analysis to determine if new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts are significant, such that DOE must prepare a Supplemental PEIS . . . . DOE considers the changes in waste volumes as new circumstances and information and will formally document these changes in the Supplement Analysis. The Supplement Analysis will also document whether or not the potential impacts from the options currently being considered are bounded by those of the WM PEIS. The Supplement Analysis will be released in early October [1998] with an accompanying notice in the Federal Register. Based on the Supplement Analysis, DOE will decide whether or not to prepare a Supplemental PEIS.

50. DOE never prepared the Supplement Analysis referenced in the Information Package, and never prepared a supplemental PEIS.

51. On December 10, 1999, DOE published a Notice of Preferred Alternatives in the Federal Register, identifying Hanford and NTS as DOE's preferred sites for disposal of LLW and MLLW. This notice provided little analysis of DOE's justification for selecting Hanford and NTS as preferred disposal sites. The notice did not solicit public comment on DOE's selection of preferred alternatives.

52. On February 18, 2000, DOE issued its Record of Decision (2000 ROD) confirming its selection of Hanford and NTS as regional sites for disposal of LLW and MLLW.

53. The 2000 ROD stated that DOE's decision to regionalize LLW disposal at Hanford and NTS was "based on low impacts to human health, operational flexibility, and relative implementation cost." Specifically as to

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Hanford, the 2000 ROD relied on (1) Hanford's arid climate and (2) the expansion capability of existing disposal facilities at Hanford.

54. The 2000 ROD stated that DOE's decision to regionalize MLLW disposal at Hanford and NTS was likewise based on "low impacts to human health, operational flexibility, and relative implementation cost." Specifically, the 2000 ROD stated, "The Hanford Site and NTS are the only two DOE sites that have MLLW disposal facilities already constructed. Use of these existing facilities will avoid environmental impacts and costs associated with facility construction."

55. On September 20, 2000, then DOE Secretary of Energy Bill Richardson wrote to Washington State Governor Gary Locke to acknowledge concerns regarding the 2000 ROD that the Governor had expressed in both meetings and telephone conversations with Secretary Richardson. In the letter, Secretary Richardson committed that DOE would make no shipments of LLW or MLLW from new generators until after DOE awarded a contract for treatment of Hanford tank wastes, which the Secretary expected to occur by January 15, 2001.

56. On December 8, 2000, Carolyn Huntoon, then DOE Assistant Secretary for Environmental Management, wrote to Thomas Fitzsimmons, then Director of the Washington State Department of Ecology, and further assured the State that DOE:

> [D]oes not plan on making any shipments of [LLW] or [MLLW] for disposal at Hanford from new generators until the Department has completed the Hanford Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement and issued a Record of Decision based on that document.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

The letter assured the State that DOE would consult with the State prior to any shipments in the event that "unexpected circumstances" caused DOE's plans to change in this regard.

57. Ms. Huntoon reiterated this commitment in a letter to Mr. Fitzsimmons dated April 3, 2001.

58. On May 15, 2002, DOE distributed its Draft Hanford Site Solid Waste Environmental Impact Statement (Draft EIS) (dated April 2002). This Draft EIS indicated that it was a tiered environmental review document intended to address local decisions needed to implement the RODs issued pursuant to the WM PEIS. Based on widespread public and agency criticism of the Draft EIS, DOE indicated that it intended to publish a revised Draft EIS in the spring of 2003.

59. On September 6, 2002, DOE published in the Federal Register a Notice of a Revised Record of Decision for the Treatment and Storage of Transuranic Waste (2002 ROD), revising DOE's 1998 ROD regarding transuranic waste. The 2002 ROD was dated August 27, 2002. It indicated that DOE had decided to transfer to Hanford 27 cubic meters of transuranic waste (including mixed waste) from the Battelle Columbus Laboratory (Battelle) in Columbus, Ohio, and 9 cubic meters of transuranic waste (including mixed waste) from the Energy Technology Engineering Center (ETEC) in Canoga Park, California.

60. According to the 2002 ROD, DOE planned to ship from Battelle to Hanford approximately 115 fifty-five gallon drums of remote-handled transuranic waste and approximately 10 drums of contact-handled transuranic waste. DOE

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

informed the State that the waste contains the following radioactive constituents: cesium, plutonium, strontium, curium, americium, cobalt, and uranium. Some of the inventory may also be contaminated (mixed) with one or more of the following hazardous waste constituents: barium, chromium, lead, mercury, silver, benzene, carbon tetrachloride, methyl ethyl ketone, and trichloroethylene. Exposure to the radiological components in these shipments could cause significant health effects, including cancer and death. Exposure to the hazardous chemicals can be toxic to the nervous system and the kidneys, as well as also posing cancer dangers.

61. According to the 2002 ROD, DOE also intended to ship from ETEC to Hanford approximately 15 to 34 drums of remote-handled transuranic waste and approximately 11 drums of contact-handled transuranic waste. DOE informed the State that the waste includes the radioactive constituents plutonium, americium, cesium, and strontium. Hazardous constituents include mercury, cadmium, copper, lead, silver, mercury, and volatile organics. The ETEC waste also contains polychlorinated biphenyls (PCBs). Exposure to these materials can cause serious health effects. These materials pose significant risks to human health and the environment. Ionizing radiation from the radioisotopes can cause cancer and death in humans, acute radiation syndrome, and other significant health effects. The heavy metal hazardous constituents, such as lead and mercury, are toxins that can affect the central nervous system.

62. WIPP is not currently authorized by the State of New Mexico and EPA to accept remote-handled transuranic waste or transuranic waste

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

contaminated with PCBs. DOE does not expect to begin shipping remote-handled transuranic waste to WIPP until 2006. However, there is no guarantee that WIPP will *ever* accept remote-handled transuranic waste or transuranic waste contaminated with PCBs. Thus, these wastes will be stored at Hanford indefinitely.

63. According to a briefing paper provided to the State by DOE, "[P]otentially, any Site within the DOE Complex could ship [transuranic] waste to Hanford." DOE has already identified fifteen sites, with a total of 1,596 cubic meters (equivalent to 7,980 fifty-five gallon drums) of contact-handled transuranic waste that it is considering shipping to Hanford. DOE has identified seven sites, with a total of 142 cubic meters (710 fifty-five gallon drum equivalents) of remote-handled transuranic waste that it is considering shipping to Hanford.

64. On Thursday, October 24, 2002, the Federal Bureau of Investigation issued a warning to state and local law enforcement officials about a possible terrorist attack against transportation systems. While the primary focus of the warning was on the nation's railroads, the report is a reminder of the need for heightened scrutiny of terrorist risks to our nation's transportation system, particularly where radioactive and hazardous substances are involved.

65. There is no compelling reason for DOE to ship these wastes to the Hanford Site at this time. There are alternatives available to DOE, such as treating and storing the wastes at their present location, pending shipment to and final disposal at WIPP.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

66. On Thursday, October 24, 2002, DOE informed Thomas Fitzsimmons, then Director of the Washington State Department of Ecology, that the first shipment from ETEC or Battelle would occur on November 5, 2002.

67. On Tuesday, October 29, 2002, upon learning that these shipments were imminent, Washington State Governor Gary Locke and Attorney General Christine Gregoire wrote to DOE Secretary Spencer Abraham. In their letter, the Governor and Attorney General objected to the proposed shipments on the basis that DOE had not made adequate progress addressing the transuranic waste already at Hanford, had not clearly defined how much additional transuranic waste DOE intended to ship to Hanford nor how it would be managed there, and had not fully considered the risks associated with transporting such wastes to and managing them at Hanford.

68. On Wednesday, October 30, 2002, Mr. Fitzsimmons received via facsimile a letter from Keith Klein, Manager of DOE's Richland (Hanford) Field Office. The letter indicated that DOE would not ship any transuranic waste to Hanford during the week of November 4-8 as it had planned, and that DOE would provide one-week notice to the State prior to any shipments.

69. On Thursday, December 5, 2002, Mr. Fitzsimmons had a telephone discussion with Jessie Roberson, DOE's Assistant Secretary for Environmental Management. Ms. Roberson advised Mr. Fitzsimmons that DOE believed that it must begin shipping transuranic waste to Hanford from DOE's ETEC facility in California by Thursday, December 19, 2002. (This conversation did not constitute

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

the seven-day notice described in the preceding paragraph.) During this discussion, Mr. Fitzsimmons reiterated the State's concerns, as outlined in the Governor's and Attorney General's letter, and advised Ms. Roberson that if they could not reach an accommodation of the State's concerns, the State would file a lawsuit to stop the shipments until the State's concerns were addressed.

70. On Wednesday, December 11, 2002, Mr. Fitzsimmons received via facsimile a letter from Mr. Klein formally notifying the State of DOE's intent to begin shipping both Battelle and ETEC transuranic waste to Hanford on or after Wednesday, December 18, 2002.

71. In an effort to avoid litigation between DOE and the State, Mr. Fitzsimmons traveled to Washington D.C. and met with Ms. Roberson and other senior DOE officials to discuss the matter on Friday, December 13, 2002.

72. During the December 13 meeting, Ms. Roberson made certain commitments intended to address the State's concerns regarding the proposed shipments of transuranic waste. DOE agreed to negotiate with the State and EPA new requirements for retrieval, characterization, and management of transuranic wastes at Hanford. These requirements would take the form of new milestones and the modification of existing milestones under the HFFACO. The parties set March 1, 2003, as the deadline for reaching agreement on such requirements. Additionally, DOE also committed that it would not proceed with any future shipments, beyond those outlined in the 2002 ROD, until March 1, 2003. DOE also committed to revise, pursuant to public comment, and reissue a draft of the

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

Hanford Site Solid Waste EIS, and submit that revised draft for public comment. Finally, DOE committed to pursue a collective dialogue with interested states with the objective of developing strategies to guide and facilitate the disposition of transuranic waste located throughout the DOE national nuclear weapons complex.

73. In return for DOE's commitments as described above, Mr. Fitzsimmons committed that the State of Washington would forgo, until March 1, 2003, litigation to stop DOE shipments of transuranic waste described in the 2002 ROD.

74. DOE began shipping ETEC and Battelle transuranic waste to the Hanford Site on or about December 20, 2002. On or about December 20, 2002, Hanford received four shipments of transuranic waste, two each from ETEC and Battelle. The Hanford Site received two additional shipments from Battelle on or about February 6, 2003. To date, DOE has completed six shipments, containing a total of 40 drums of transuranic waste, of which 13 drums are contact-handled and 27 are remote-handled transuranic waste.

75. Following the December 13, 2002 meeting, the State, EPA, and DOE entered into a period of intensive negotiations. A fundamental premise of those negotiations was that the resulting agreement would include HFFACO milestones for retrieving, characterizing, and preparing (*i.e.*, "certifying") Hanford Site transuranic waste for shipment to WIPP for disposal.

76. On Thursday, February 27, 2003, after weeks of detailed negotiations founded on these principles, and less than 48 hours prior to the March 1, 2003,

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

deadline for completion of the negotiations, DOE notified state officials that it would not agree to any enforceable milestones for certification of Hanford Site transuranic waste for disposal at WIPP.

77. Having secured no enforceable commitments for certifying transuranic waste already at Hanford, the State had no assurance that DOE would have the capability in place at Hanford to prepare for shipment to WIPP transuranic waste sent to Hanford from other DOE sites for "temporary" storage, let alone the approvals needed to actually dispose of that waste at WIPP.

78. Additional shipments of transuranic waste to Hanford were imminent. At the time the State filed this lawsuit, DOE had already notified the State that it intended to make two shipments of transuranic waste from Battelle to Hanford to arrive on Wednesday, March 5, 2003, and two more shipments from Battelle to arrive at Hanford on Wednesday, March 19, 2003. The State expects that DOE will notify it of additional shipments in the future.

79. The State filed this lawsuit on March 4, 2003, seeking declaratory and injunctive relief.

80. Also in March 2003, DOE published its Revised Draft Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement (Revised Draft HSW EIS).

81. On May 9, 2003, this Court issued an Order Granting Motion for Preliminary Injunction filed by the State. The Order enjoins DOE from making

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

"any further shipments of TRUW [transuranic waste] to Hanford pending final resolution of this litigation."

82. On February 3, 2004, DOE published its Final Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement (HSW EIS).

83. The HSW EIS purports to be the sitewide or project-specific NEPA review described in the WM PEIS as a prerequisite to decisions regarding the specific technologies to be employed and actual locations of waste management facilities at particular DOE sites.

84. The HSW EIS purports to consider alternatives for managing at Hanford wastes including the following: LLW, MLLW, immobilized low-activity waste, and transuranic waste. The HSW EIS purports to evaluate alternatives for managing LLW, MLLW, immobilized low-activity waste, and transuranic waste at Hanford, including assumed shipment to Hanford of a range of volumes of LLW, MLLW, and transuranic wastes from other sites.

85. The HSW EIS assumes that Hanford will serve as a regional disposal facility for DOE LLW and MLLW, based on the WM PEIS and 2000 ROD, and assumes that Hanford will store and process off-site transuranic waste pending disposal at WIPP, based on the WM PEIS and the 1998 and 2002 RODs. The HSW EIS does not evaluate alternatives to performing these functions at Hanford.

86. The HSW EIS identified DOE's preferred alternative as those actions identified in Alternative Group D1. The HSW EIS indicates that the preferred

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

alternative would be implemented for Hanford with off-site waste received up to the upper bound waste volume considered in the HSW EIS.

87. Under the HSW EIS preferred alternative, DOE would ship up to 219,663 cubic meters of off-site LLW to Hanford for disposal. This is the equivalent of 1,098,315 fifty-five gallon drums. It would be in addition to 411,764 cubic meters of Hanford LLW DOE already has disposed of in unlined trenches at Hanford or that DOE intends to dispose of at Hanford in the future.

88. Under the HSW EIS preferred alternative, DOE would ship up to 140,435 cubic meters of off-site MLLW to Hanford for disposal. This is the equivalent of 702,175 fifty-five gallon drums. It would be in addition to 58,414 cubic meters of Hanford MLLW that DOE already has disposed of or intends to dispose of at Hanford.

89. Under the HSW EIS preferred alternative, DOE would ship to Hanford for indefinite storage and treatment, pending ultimate disposal at WIPP, up to 1,557 cubic meters of off-site transuranic waste. This is the equivalent of 7,785 fifty-five gallon drums. It would be in addition to 45,749 cubic meters of Hanford transuranic waste that DOE already is managing at Hanford.

90. Under DOE's preferred alternative, DOE would utilize the same facilities for managing off-site waste as it would for managing Hanford waste. Adding these significant quantities of waste to the existing waste management challenges at Hanford would be an enormous burden on the Site and would distract resources from cleanup of the monumental environmental problems already there.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

91. In the HSW EIS, DOE declares that unspecified portions of Hanford groundwater constitute an "irreversibly and irretrievably committed" natural resource:

> DOE anticipates that current contamination would preclude the beneficial use of groundwater underneath portions of the Hanford Site for the foreseeable future. It is assumed that tritium and iodine-129 groundwater plumes would exceed the drinking water standards for the next several hundred years.
>
> Within a few hundred years after disposal of wastes evaluated in the HSW EIS, some mobile radionuclides from the wastes would reach the vadose zone surrounding disposal areas and groundwater beneath the Hanford Site. Results of computer simulations . . . predict that levels of these contaminants in groundwater would be below DOE benchmark drinking water standards at 1 kilometer . . . .
>
> However, due to uncertainties in inventory estimates and mobility parameters, DOE considers groundwater underneath portions of the Hanford Site that is proximate to, or downgradient from, waste sites at Hanford to be irretrievably committed.

HSW EIS Section 5.15, p. 5.300.

92. The HSW EIS fails to adequately evaluate impacts and risks related to DOE proposed actions, including impacts and risks related to Hanford groundwater.

93. On June 23, 2004, DOE issued a ROD based on the HSW EIS, titled "Record of Decision for the Solid Waste Program, Hanford Site, Richland, Washington: Storage and Treatment of Low-Level Waste and Mixed Low-Level Waste, and Storage, Processing, and Certification of Transuranic Waste for Shipment to the Waste Isolation Pilot Plant" (2004 HSW EIS ROD).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

94. In its 2004 HSW EIS ROD, DOE decided to implement the preferred alternative described in the HSW EIS. The ROD indicates that DOE will limit the volumes of off-site LLW received at Hanford to 62,000 cubic meters and will limit the volume of off-site MLLW received at Hanford to 20,000 cubic meters. The ROD assumes that DOE will ship up to 1,550 cubic meters of off-site transuranic waste to Hanford for indefinite storage and processing pending disposal at WIPP. It indicates that if DOE decides to ship additional transuranic waste to Hanford, its decision would be made in subsequent ROD or RODs.

95. Concurrent with DOE's issuance of the 2004 HSW EIS ROD, DOE issued a separate ROD, entitled "Revision to the Record of Decision for the Department of Energy's Waste Management Program: Treatment and Storage of Transuranic Waste" (2004 Transuranics ROD).

96. In the 2004 Transuranics ROD, DOE indicates that it has decided to revise the 2002 ROD (in which DOE decided to ship Battelle and ETEC transuranic waste to Hanford for storage and/or processing pending disposal at WIPP). In this "revision," DOE confirms its September 6, 2002, decision to ship the Battelle waste to Hanford, and indicates DOE's intent to complete the transfer of the remaining 20 cubic meters of remote-handled transuranic waste, plus the 5 cubic meters of additional remote-handled waste that DOE has since generated at Battelle. The ROD also states DOE's intent to transfer the remaining 2 cubic meters of contact-handled transuranic waste, plus an additional 10 cubic meters that DOE has since generated at Battelle. The ROD indicates that DOE will make

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

these transfers "once the preliminary injunction issued by the U.S. District Court for the Eastern District of Washington is lifted."

97. On June 23, 2004, the day DOE issued the 2004 HSW EIS ROD, DOE began shipping MLLW to Hanford. Specifically, DOE shipped 17 drums on June 23, 91 drums on June 24, and 1 drum on June 25. This DOE waste originated from DOE's Rocky Flats site, but was being stored at a commercial treatment facility in Richland, Washington called Pacific EcoSolutions (PEcoS).

98. On June 28, 2004, the Hanford Site received an additional four shipments of off-site LLW, some or all of which was from DOE's Fermi facility in Illinois.

99. On June 30, 2004, Ecology received written notification from PEcoS that DOE intended to ship to PEcoS for treatment up to 300 cubic meters (600 drums and 50 large boxes) of MLLW comprised of heterogeneous debris and radioactive lead solids. The notice indicated that the waste would be received at PEcoS' facility approximately the fourth week of July. The notice indicates the waste will be disposed of at Hanford.

100. On July 9, 2003, Ecology received written notification from PEcoS that DOE intended to ship to PEcoS for treatment up to 31,000 cubic feet of MLLW. The notice indicated that the waste would be received by PEcoS during the first week in August, and would be disposed of at Hanford.

101. Shipments of additional LLW and MLLW to the Hanford Site are imminent.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

V. CLAIMS FOR RELIEF

COUNT 1: Violation of § 102(2)(C) of the National Environmental Policy Act

102. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 101 above.

103. NEPA, 42 U.S.C. § 4321 *et seq.*, requires that all federal agencies prepare a detailed EIS on every proposal for a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The EIS must contain a detailed discussion of environmental impacts (40 C.F.R. § 1502.16), including cumulative environmental impacts (40 C.F.R. § 1508.7), alternatives to the proposed action (40 C.F.R. § 1502.14), and appropriate measures to mitigate adverse environmental impacts (40 C.F.R. § 1502.14, .16).

104. DOE's decisions, as set forth in the 2002 ROD, the 2004 HSW EIS ROD, and the 2004 Transuranics ROD, to transport, process, and/or store at Hanford, transuranic waste from other DOE sites are major federal actions significantly affecting the quality of the human environment for which NEPA requires the preparation of an EIS.

105. DOE's decisions, as set forth in the 2000 ROD and the 2004 HSW EIS ROD, to create a regional disposal facility for LLW and MLLW at Hanford, are major federal actions significantly affecting the quality of the human environment for which NEPA requires the preparation of an EIS.

106. The WM PEIS prepared by DOE in May 1997 is inadequate under NEPA to support DOE's decision to transport transuranic waste for storage and/or

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

processing pending disposal at WIPP, and is inadequate to support DOE's decision to transport to and dispose of at Hanford LLW and MLLW to Hanford from other DOE sites, because the WM PEIS does not adequately analyze site-specific impacts of performing such functions at Hanford or any other site.

107. The WM PEIS fails to comply with NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii), which requires an EIS to include a detailed analysis of alternatives to the proposed action. DOE's analysis is too vague and general to support site-specific decisions. For example, the WM PEIS fails to analyze how potential environmental impacts identified in the EIS would favor the selection of one site over another. It fails to reasonably consider the nature and extent of contamination and wastes currently at Hanford and other sites, how these factors affect treatment and disposal alternatives, and how treatment and disposal alternatives affect management of existing contamination and waste.

108. The Council on Environmental Quality's implementing regulations, at 40 C.F.R. § 1502.14(e), require that the alternatives analysis identify the agency's preferred alternative. The WM PEIS identifies DOE's preferred alternative as sending LLW and MLLW to regional disposal sites. The WM PEIS does not identify Hanford or any other sites as the preferred site for regional disposal of waste. Nor did DOE, prior to selecting Hanford, perform any site-specific NEPA environmental review that justified selection of Hanford over other potential sites for regional disposal of LLW and MLLW.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

109. Although the WM PEIS indicates that future decisions regarding the transfer of wastes to Hanford and other sites would be made on the basis of appropriate NEPA review, DOE did not conduct such a review prior to the 2000 ROD designating Hanford as a regional disposal site for LLW and MLLW. Nor did DOE conduct such review prior to the 2002 ROD deciding to send transuranic waste from the ETEC and Battelle sites to Hanford.

110. Given the large, complex nature of the Hanford Site, the multiple treatment, storage, and disposal facilities at Hanford, the hundreds of contaminated sites and waste streams, and the non-compliant storage of thousands of cubic meters of transuranic waste already at Hanford, NEPA requires that DOE prepare a programmatic EIS or a sitewide EIS before deciding to ship transuranic waste, LLW, or MLLW across the country for storage, processing, or disposal at Hanford. DOE's own regulations, at 10 C.F.R. § 1021.330, require the preparation of such a sitewide analysis, and require that it be updated at least every five years.

111. NEPA likewise requires that DOE consider the cumulative impacts on the environment that result from managing all waste that DOE reasonably foresees it may send to or otherwise manage at Hanford, as well as the cumulative effects in relation to the management of the wastes already at the Hanford Site. To date, DOE has failed to do so in compliance with NEPA.

112. The WM PEIS is an inadequate basis for DOE's decisions to ship transuranic waste, LLW and MLLW to Hanford because the WM PEIS relies on out-of-date information concerning the volume of wastes at the sites analyzed,

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

transportation of these wastes, and their potential impacts. The census data used to evaluate these factors was from 1990, and populations along the likely transportation corridors, and nearby the Hanford Site, have increased significantly since 1990.

113. NEPA requires that DOE prepare a supplemental EIS if DOE makes substantial changes in the proposed action that are relevant to environmental concerns, or where there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9; 10 C.F.R. § 1021.314.

114. DOE's identification of Hanford as a preferred location for regional disposal of LLW and MLLW was a substantial change from the proposed action in the Final WM PEIS, and required the preparation of a supplemental EIS, which DOE failed to do.

115. New data referenced in the Information Package and otherwise developed after the publication of data used by DOE in the WM PEIS constituted significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This new data required the preparation of a supplemental EIS, which DOE failed to do. This new information concerned the volume of waste located at each of the sites analyzed, the extent of contamination, and the rates at which such contamination will travel to the groundwater and surface waters.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

116. When it is unclear whether or not a supplemental EIS is required, DOE is required to prepare a supplement analysis. The supplement analysis is required to discuss the circumstances that are pertinent to deciding whether to prepare a supplemental EIS, and shall contain sufficient information for DOE to determine whether (1) an existing EIS should be supplemented; (2) a new EIS should be prepared; or (3) no further NEPA documentation is required. DOE is required to make the determination and the related supplement analysis available to the public for information. 10 C.F.R. § 1021.314.

117. In the alternative to the allegations contained in Paragraphs 114 and 115, Plaintiff alleges that DOE's identification of Hanford as a preferred location for regional disposal of LLW and MLLW, and new data referenced in the Information Package and otherwise developed after the publication of data used by DOE in the WM PEIS, required the preparation of a supplement analysis pursuant to 10 C.F.R. § 1021.314, which DOE failed to do. This new information concerned the volume of waste located at each of the sites analyzed, the extent of contamination, and the rates at which such contamination will travel to the groundwater and surface waters.

118. The increases in populations along the likely transportation corridors and near the Hanford Site since 1990, coupled with the heightened risk of terrorist attacks to transportation of radioactive and hazardous wastes, are significant new circumstances and information relevant to environmental concerns and bearing on DOE's proposed action and its impacts. DOE is therefore required to prepare a

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

supplemental EIS prior to its decision to transport transuranic waste to Hanford for treatment and/or storage. The supplemental EIS should evaluate all alternatives for storage and treatment of transuranic wastes pending final disposition at WIPP, and all alternatives for disposal of LLW and MLLW. DOE has failed to prepare such a supplemental EIS.

119. The HSW EIS published by DOE in 2004 did not cure the deficiencies in DOE's NEPA process. While the HSW EIS purports to evaluate site-specific impacts of alternative waste management approaches at Hanford, it does not consider the site-specific impacts of choosing Hanford for managing off-site LLW, MLLW, or transuranic waste as compared to such impacts at other DOE sites.

120. The HSW EIS failed to adequately assess the impacts of and alternatives for managing off-site transuranic waste, LLW, or MLLW at Hanford, as well as the impacts of and alternatives for managing wastes already at Hanford. For example, the HSW EIS contains inadequate analysis of alternatives and impacts associated with managing remote-handled and non-standard container waste, as well as waste requiring thermal treatment. It fails to adequately assess impacts to groundwater. It fails to adequately assess the cumulative impacts of adding additional waste to Hanford—a facility that is already woefully out of compliance with environmental requirements.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

121. By virtue of DOE's failure to comply with NEPA, DOE's decision to ship additional transuranic wastes, LLW, and MLLW to Hanford is not fully informed, is incomplete, and is inadequate.

122. By virtue of DOE's failure to comply with NEPA, the public has been denied the opportunity to review and comment on DOE's plan to transport transuranic wastes, LLW, and MLLW to Hanford, and on how DOE intends to manage or dispose of such wastes once they arrive at the Hanford Site. Compliance with the procedural requirements of NEPA will ensure that DOE's plans are subject to public scrutiny.

123. Washington State will suffer irreparable harm in the event that DOE is permitted to ship additional wastes from other DOE sites for storage, treatment, or disposal at Hanford without first complying with NEPA's procedural requirements for assessment of potential adverse environmental impacts. Such harm includes the risks of contamination of state-owned groundwater, contamination of the Columbia River, potential contamination of drinking water, disruption of state roads and highways, and potential public health and environmental impacts in the event of a release of radioactive or hazardous wastes during transportation of the wastes to Hanford or while the waste is at the Hanford Site.

124. Once the waste is shipped to Hanford, it will be difficult (if not impossible) to send it back, because DOE intends to close the sites from which it came. Moreover, because WIPP does not currently accept remote-handled

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

transuranic waste, or transuranic waste contaminated with PCBs, and there is no guarantee that it will ever do so, shipment of the transuranic waste to Hanford will result in indefinite, if not permanent storage or disposal of the waste at the Hanford Site.

COUNT 2: Violation of the Administrative Procedure Act

125. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 124 above.

126. Due to Defendants' knowing and conscious failure to comply with NEPA, Plaintiff has suffered legal wrongs because of agency action, and is adversely affected and aggrieved by agency action within the meaning of the APA, 5 U.S.C. § 702.

127. Defendants' knowing and conscious failure to comply with NEPA is arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2), and should therefore be declared unlawful and set aside by this Court.

COUNT 3: Violations of the Washington Hazardous Waste Management Act Land Disposal Restriction Storage Prohibition

128. Plaintiff repeats and incorporates by reference the allegations contained in paragraphs 1 through 127 above.

129. The HWMA, Wash. Rev. Code 70.105, through its implementing regulation, Wash. Admin. Code § 173-303-140(2)(a) (incorporating by reference

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

40 C.F.R. § 268.50), prohibits the storage of hazardous wastes restricted from land disposal pursuant to 40 C.F.R. §§ 268.30-268.39, unless the storage is solely for the purpose of accumulating such quantities of the hazardous waste as necessary to facilitate proper recovery, treatment, or disposal. Mixed transuranic wastes from Battelle and ETEC are restricted from land disposal pursuant to 40 C.F.R. §§ 268.30-268.39. Mixed transuranic wastes from Battelle and ETEC will not be stored at Hanford solely for the purpose of the accumulation of such quantities as necessary to facilitate proper recovery, treatment, or disposal. Such storage will thus violate Wash. Admin. Code § 173-303-140(2)(a) (incorporating by reference 40 C.F.R. § 268.50).

130. Moreover, since 1970, DOE began storing transuranic and other radioactive waste in boxes and drums that it buried in unlined trenches at the Hanford Site. Today, approximately 15,000 cubic meters (the equivalent of 75,000 fifty-five gallon drums) of this waste remains in so-called "retrievable storage" at Hanford. DOE is also storing additional volumes of TRUM waste in various facilities at Hanford, including T-Plant, the Central Waste Complex, the Purex Tunnels, the Plutonium Finishing Plant, the 325 Hazardous Waste Treatment Unit, the Waste Receiving and Processing Facility, and the 324 Building. These wastes are stored in violation of RCRA and HWMA requirements, including the storage prohibition referred to in paragraph 129 of the State's First Amended Complaint, that have applied to this waste since at least 1987.

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

131. As of March 4, 2003, when the State filed this lawsuit, under DOE's plans—for which there were no enforceable commitments in place—DOE would not complete retrieval and preparation for shipment of retrievably stored transuranic waste until 2024, and would not begin retrieval of remote-handled transuranic waste until 2013.

132. On March 10, 2003, the Director of Ecology issued a "Final Determination" pursuant to the HFFACO in the matter of HFFACO Milestone Series M-91 and Hanford Site Transuranic and Mixed Transuranic Wastes.

133. On April 9, 2003, the United States filed separate Complaints against the State in the United States District Court for the Eastern District of Washington (Cause No. CT-03-5038-EFS) and in the Superior Court of Washington for Benton County (Cause No. 03-2-00722-3), challenging said Final Determination.

134. On April 30, 2003, Ecology issued to DOE Administrative Order No. 03NWPKW-5494, establishing a compliance schedule for the retrieval, designation, and treatment (and, in the case of mixed transuranic wastes, treatment or certification) of DOE's "retrievably stored" waste, and for treatment of certain other mixed waste stored at DOE's Hanford Site.

135. On or about May 29, 2003, DOE appealed the Administrative Order referred to in Paragraph 134 of the State's First Amended Complaint, to the Washington State Pollution Control Hearings Board (Matter No. PCHB No. 03-079).

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

136. In the litigation matters referred to in Paragraphs 133 and 135 of the State's First Amended Complaint, DOE challenges Ecology's authority to apply treatment or certification requirements, and land disposal restriction (LDR) storage prohibitions, to DOE's TRUM waste.

137. The United States and the State have entered into a settlement of the litigation matters referred to in Paragraphs 133 and 135 of the State's First Amended Complaint. As part of their settlement, the United States and the State have agreed to add to HFFACO compliance schedules for the retrieval and designation of DOE's "retrievably stored" waste, and for the treatment of certain other mixed waste stored at the Hanford Site.

138. Because the United States and the State disagree over whether the State has legal authority to require DOE to treat or certify retrievably stored waste and other stored waste determined to be TRUM, the United States and the State have conditioned the applicability of specified agreed to HFFACO requirements regarding the storage and treatment or certification of TRUM on the outcome of this Court's ruling as to the scope and applicability of the exemption for "transuranic mixed waste designated by the Secretary [of Energy] for disposal at WIPP" contained in the 1996 WIPP Land Withdrawal Act Amendments.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that Defendants' 1997 Programmatic Waste Management EIS and Defendants' HSW EIS are inadequate to support Defendants' decisions,

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

manifested in DOE's 2002 ROD, its 2004 HSW EIS ROD, and its 2004 Transuranics ROD, to ship to the Hanford Site for processing and/or storage of off-site transuranic wastes. Declare that DOE's decision therefore violates NEPA and the APA and, consequently, is null and of no legal effect;

2. Declare that Defendants' 1997 WM PEIS and Defendants' HSW EIS are inadequate to support Defendants' decisions, manifested in DOE's 2000 ROD and its 2004 HSW EIS ROD, to ship LLW and MLLW to the Hanford Site for disposal;

3. Declare that Defendants' continued storage of untreated TRUM waste and storage at Hanford of additional off-site TRUM waste at the Hanford Site violates the HWMA's LDR storage prohibition contained in Wash. Admin. Code 173-303-140(2)(a);

4. Grant Plaintiff preliminary injunctive relief, enjoining Defendants from shipping any additional TRU, TRUM, LLW, or MLLW to Hanford during the pendency of this litigation;

5. Issue a permanent mandatory injunction: (1) requiring Defendants to rescind decisions contained in DOE's 2000 ROD, and its 2004 HSW EIS ROD to regionally dispose of LLW and MLLW at Hanford; (2) requiring Defendants to rescind decisions contained in DOE's 2002 ROD, its 2004 HSW EIS ROD, and its 2004 Transuranics ROD to ship TRU and TRUM waste to Hanford for processing and/or storage; and (3) prohibiting Defendants from shipping any such waste to the Hanford Site until Defendants have complied with the following requirements:

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760

a. Defendants have complied with the APA, NEPA, and NEPA implementing regulations as required to fully consider any proposed action regarding shipment of off-site LLW, MLLW and transuranic waste to Hanford and management of such waste at the Hanford Site.

b. The publication of a lawful ROD based on the considerations above; and

c. Defendants have fully complied with the HWMA LDR storage prohibition on continued storage of untreated LDR restricted waste.

6. Allow Plaintiff to recover the costs of this action, including attorney's fees; and

7. Grant such other and further relief as the Court deems just and proper.

DATED this 19th day of July, 2004

CHRISTINE O. GREGOIRE
Attorney General

JOSEPH E. SHORIN III, WSBA #19705
Assistant Attorney General
(360) 586-6741

ANDREW A. FITZ, WSBA #22169
Assistant Attorney General
(360) 586-6752

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
FAX (360) 586-6760